Filed 8/3/09 P. v. Otts CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STACEY MARIE OTTS,

Defendant and Appellant.

F055414

(Super. Ct. No. BF121869A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Deirdre L. O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Stacey Marie Otts was convicted by jury trial of felony possession of blank checks, belonging to Sarah and Jason Moore, with the intent to complete the checks and defraud any person (Pen. Code, § 475, subd. (b)).[1] The court suspended imposition of the sentence and granted defendant formal probation for three years, the first year to be served in county jail.

On appeal, defendant contends (1) insufficient evidence supports the conviction, (2) the trial court erred by admitting evidence of other crimes, (3) the trial court erred by failing to instruct sua sponte with CALJIC Nos. 2.50 and 2.50.1 regarding the limited admissibility and the burden of proof of other crimes evidence, (4) the trial court erred by instructing with CALJIC No. 2.15 regarding possession of stolen property, (5) the prosecutor committed various misconduct during argument, and (6) the cumulative effect of the errors was prejudicial. We will affirm.

FACTS

Police Officer Dougherty made a traffic stop at about 2:45 a.m. on October 31, 2007. The driver was Damien Doyle, but the car belonged to defendant, who lived a few blocks away. After the officer searched the car and found nothing, he called defendant to determine whether Doyle had permission to drive her car. She said that he did. Shortly after the stop, the officer took Doyle to defendant's apartment. The officer asked defendant for permission to search her residence and she consented. The officer searched primarily in the bedroom, which defendant identified as hers. He found a folded, unsealed letter-sized envelope containing miscellaneous papers and checks. The folded envelope was on a headboard shelf that ran about two feet above the bed.

The following items were inside the envelope:

(1) three blank checks (Nos. 703, 704, 705; exhibits 1-3) on a Citibank account in the names of Jason and Sarah Moore (the basis of the charge against defendant);

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[1] All statutory references are to the Penal Code unless otherwise noted.

(2) six blank checks (Nos. 110, 112, 113, 116, 117, 118; exhibits 5-10) on a Washington Mutual Bank account in the name of Coleen Kapral;

(3) a completed check (No. 5176; exhibit 11), dated October 27, 2007, to Breana Potter for $2,300 on a CBSI account in the name of Walter B. Ray, signed in the name of Walter B. Ray, and endorsed in the name of Breana Potter for deposit only;

(4) a completed check (No. 1530; exhibit 4), dated October 3, 2007, to Stacy Otts for $2,000 on a Citibank account in the name of Dave Stevens, signed in the name of Dave Stevens, with a memo of "Oak Bedroom Set," and endorsed in the name of Stacey Otts;

(5) a partially completed check (No. 153; exhibit 13), dated October 23, 2007, to Albertsons on a Bank of America account in the name of Breana R. Potter, signed in the name of Breana Potter, with blank amount lines;

(6) a blank check (No. 1547; exhibit 12) drawn on a Washington Mutual Bank account in the name of Breana Potter;

(7) a photocopy, cut to normal size, of a completed check (No. 4734; exhibit 18), dated December 24, 2005, to Nannette Buford for $280 on a Montecito Bank & Trust account in the name of E. Snow, signed in the name of E. Snow;

(8) a Social Security card (exhibit 14) in the name of Fatisha Andai Harris;

(9) nine pieces of paper (exhibits 15-17, 19-24) with various people's personal identification information (such as names, addresses, telephone numbers, email addresses, Social Security numbers, bank account numbers, routing numbers, and credit card numbers), including the information of Pamela Rosetto and the information of E. Snow matching the information on the photocopied check (exhibit 18); and

(10) a personal, typed letter (exhibit 25), dated April 6, 2007, from Robert to Damien.

After finding these items, the officer spoke to defendant in her living room, where Doyle was also seated. The officer did not speak to defendant in a separate area because

he believed the envelope was hers. When the officer asked defendant about the envelope, she said it did not belong to her and she had never seen it before. She said Doyle had left some items in her apartment. The officer reviewed the checks with her and she told him she knew none of the names on the checks. He showed her the check with her name on it, and said, "'This was found inside the envelope with all the other checks. How can you explain that?'" She said she did not know how it got in the envelope. The officer seized the evidence.

Detective Dickson reviewed the evidence and, on November 29, 2007, went to defendant's apartment to get her statement and arrest her. When Dickson asked defendant how the evidence came to be in her apartment, she said, "I don't know. I was asleep." She said Doyle had brought some items into her apartment in a backpack. She told Dickson that Doyle did not stay with her or live with her; he was merely using her car that night. She said Doyle stole people's mail from a post office trash can and used a printer to print checks.

Another detective asked defendant if she had any other checks that did not belong to her. She said she did and she retrieved the following from her bedroom dresser:

(1) a check (No. 12350; exhibit 27), stamped void, on a Capital One account in the name of Jessie Becerra;

(2) a check-related paper with the same account number as exhibit 27 (exhibit 28);

(3) portions of torn checks (Nos. ___3, 5174, 5175; exhibit 29); and

(4) a portion of a torn check on a CBSI account in the name of Walter Ray (exhibit 30).[2]

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[2] According to Dickson, these checks were in the names of Presara Honda and Walter Ray. We can find no reference to Presara Honda on these exhibits or any other. As far as we can discern, these documents were in the names of Jessie Becerra and Walter Ray only.

Defendant told Dickson the documents belonged to Doyle. He had stolen defendant's car and she found these documents in the trunk after she recovered her car. She did not say how she recovered the car. Dickson's search found no stolen vehicle report.

Defense counsel, however, produced a police report dated November 7, 2007, in which defendant reported her car stolen. In the report, defendant said she had not given anyone permission to take her car. Doyle was housesitting for her and had access to her keys when her car was stolen. Dickson testified that Doyle was in jail at the time of trial.[3]

Dickson seized the additional documents defendant provided and arrested her.

In Dickson's opinion, possession of the checks and the multiple profiles of personal information were for fraudulent purposes; it was consistent with fraud and identity theft.

Dickson testified that he had 28 active cases at the time of trial. He was familiar with the name Coleen Kapral because of a case regarding a fraudulently opened Washington Mutual checking account in her name, which she had not authorized.

Sarah Moore identified the three blank checks bearing her name (exhibits 1-3) found inside the envelope as some of her checks that had been stolen.[4] These three checks were numbered 703, 704 and 705. Moore received her new checks in the mail on October 19, 2007. Multiple boxes were delivered to her regular streetside mailbox. She did not examine them until the bank called on October 24, 2007, to tell her some of her

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[3] Dickson testified to this on April 24, 2008.

[4] We note that the account number stated verbally by Moore is different by one number from the account number printed on the checks (Moore stated a 1 instead of a 4). We do not know whether the difference is Moore's error, the reporter's error, or something else. But there is no other evidence to suggest these checks were not the original checks that had been stolen, as Moore testified.

checks were missing. She discovered that the last box of checks was no longer wrapped in plastic and the last book of checks, containing numbers 701-730, was missing from the box. She had not given anyone permission to use the checks and she did not know either defendant or Doyle. Moore said two of the missing checks had already been cashed.

Defense Evidence

On March 7, 2007, Detective Schimon responded to a call to assist parole agents who had found some stolen items in Doyle's possession. The items included several checks from different banks in names other than Doyle's, about 100 sheets of blank check-making paper, and a lot of mail. One check, dated January 19, 2007, was written to Jesus Valenzuela for $495.67 on the account of Watson Realty. A second check, dated January 26, 2007, was written to Lashay Jenkins for $389.34 on the account of Bill Lee's Bamboo Chopstick Restaurant. A third check, dated March 6, 2007, was written to Pamela Rosetta for $450 on the account of Beau Peppenger and Heather Peppenger-Cranney (the Peppengers). A fourth check, dated March 6, 2007, was written to Pamela Rosetta for $1,250 on the Peppengers' account. The Peppengers' checks listed a Wells Fargo Bank routing number, but the checks were drawn from a J.P. Morgan financial institution; both checks were fraudulent. There were five other checks in various people's names, but Schimon was unable to contact those people to determine whether the checks were fraudulent. The mail included telephone bills and credit card checks in the name of Dave Jones. Also included in the items was a blue checkbook in Doyle's name, drawn on a Wells Fargo Bank account. Schimon was not able to confirm whether the checks in Doyle's name were fraudulent. The check-making paper and a printer were found in Doyle's apartment. Schimon arrested Doyle.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends the evidence is insufficient to prove she knowingly possessed the blank Moore checks and had the specific intent to use the checks to commit fraud. This contention is without merit.

A. Law

To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt. (*People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Jennings* (1991) 53 Cal.3d 334, 364.) We need not be convinced of the defendant's guilt beyond a reasonable doubt; we merely ask whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We must draw all reasonable inferences in support of the judgment (*People v. Wader* (1993) 5 Cal.4th 610, 640), and "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is not our function to reweigh the evidence, reappraise the credibility of witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. We may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

This standard of review also applies to circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does

not warrant a reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329; *People v. Panah* (2005) 35 Cal.4th 395, 487-488.) However, "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Section 475, subdivision (b) provides: "Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery." According to the instruction given in this case, the prosecution was required to prove defendant (1) possessed a blank or unfinished check, (2) had the specific intent to complete or facilitate the completion of the check and (3) had the specific intent to defraud another person. (See CALJIC No. 15.07.)

Possession of an item may be either actual or constructive. (*People v. Cordova* (1979) 97 Cal.App.3d 665, 670; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1608, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861.) "Actual or constructive possession is the right to exercise dominion and control over the [item] or the right to exercise dominion and control over the place where it is found. [Citation]. Exclusive possession is not necessary. A defendant does not avoid conviction if [her] right to exercise dominion and control over the place where the [item] was located is shared with others. [Citations.]" (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.)

Actual possession occurs when the defendant exercises direct physical dominion and control over the item. (*People v. Austin, supra,* 23 Cal.App.4th at pp. 1608-1609.) "Constructive possession exists where a defendant maintains some control or right to control [the item] that is in the actual possession of another." (*People v. Morante* (1999) 20 Cal.4th 403, 417.) "[P]ossession may be imputed when the [item] is found in a place

which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another." (*People v. Newman* (1971) 5 Cal.3d 48, 52, overruled on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862; *People v. Francis* (1969) 71 Cal.2d 66, 71; *People v. Williams* (1971) 5 Cal.3d 211, 215.) Joint constructive possession may be inferred from joint control and accessibility. (*People v. Newman, supra,* at p. 53.) "The inference of dominion and control is easily made when the [item] is discovered in a place over which the defendant has general dominion and control," such as her residence, automobile, or personal effects. (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584; *People v. Johnson* (1984) 158 Cal.App.3d 850, 854.) But "proof of opportunity of access to a place where [the item is] found, without more, will not support a finding of unlawful possession." (*People v. Redrick* (1961) 55 Cal.2d 282, 285.) "[M]ore than mere presence must be shown in order to prove constructive possession." (*People v. Jenkins, supra,* at p. 584; *People v. Johnson, supra,* at p. 854.)

The "'intent to defraud is a question of fact to be determined from all the facts and circumstances of the case. [Citations.]'" (*Perry v. Superior Court* (1962) 57 Cal.2d 276, 285.) Mere possession of unaltered blank checks, without more, is insufficient to establish the intent to complete the checks to defraud as required by the statute. (§ 475, subd. (b); *People v. Norwood* (1972) 26 Cal.App.3d 148, 159.) But "'[the intent to defraud] may be, and usually must be, inferred circumstantially.'" (*Perry v. Superior Court, supra,* at p. 285.) The circumstances surrounding the possession of the blank checks can support an inference of the intent to complete the checks to defraud. (See, e.g., *People v. Ah Sam* (1871) 41 Cal. 645, 655-656 [blank checks were immediately seized upon defendant's receipt of them; intent to complete checks to defraud sufficiently manifested by circumstances of possession alone]; *People v. Castellanos* (2003) 110 Cal.App.4th 1489, 1493-1494 ["defendant's possession of blank sheets of Selective

Service cards and instructions on making California driver's licenses could lead a reasonable trier of fact to infer that he possessed the requisite intent to defraud"].)

In addition, the intent to defraud can be inferred from the commission of other similar offenses, as we will discuss later. (See *People v. Smith* (1984) 155 Cal.App.3d 1103, 1148, disapproved on other grounds in *Baluyut v. Superior Court* (1996) 12 Cal.4th 826; *People v. Norwood*, *supra*, 26 Cal.App.3d at p. 159 [unauthorized possession of more than one forged document for the payment of money and a driver's license made out in another's name is evidence of fraudulent intent].)

B. Analysis

Defendant argues that although the envelope containing the blank Moore checks was found in her bedroom, Doyle was the one engaged in fraud and he brought personal items into her apartment that evening. He left the apartment after she was asleep and borrowed her car. Defendant recognizes that exhibit 4—the $2,000 check written to her and endorsed by her—connects her to the contents of the envelope, but she asserts there is no evidence to suggest that exhibit 4 is fraudulent or that she engaged in any wrongdoing. She argues that without evidence to the contrary, exhibit 4 must be presumed valid and legitimately conveyed to her. Because she did not know how it got into the envelope, the plausible explanation is that Doyle took her endorsed check without her knowledge, and he intended to cash it for his own purposes. She says the theory that she was engaged in a joint fraudulent venture with Doyle is merely a suspicion with no evidence to support it.

Defendant also argues there is no evidence of her intent to defraud, even if she was aware of the presence of the Moore checks. Again, she relies on the premise that there is no connection between the envelope's contents and any wrongdoing on her part. She also maintains that her innocent association with Doyle is not enough to support the inference that she had the intent to defraud.

First, there is substantial evidence from which the jury could infer that defendant possessed the envelope and knew of its presence. The envelope was located and visible on the headboard shelf of defendant's own bedroom in her own apartment and was therefore immediately accessible to her and subject to her exclusive or joint dominion and control. Further, defendant's own property—her $2,000 endorsed check (exhibit 4)—was inside the envelope, strongly suggesting she knew where the envelope was and what was in it. Based on this evidence, the jury was entitled to find that defendant knowingly possessed the envelope and its contents.

Second, there is substantial evidence from which the jury could infer that defendant intended to complete the checks to defraud. Contrary to defendant's repeated urgings, the record does indeed contain evidence to support a reasonable inference that exhibit 4 is a fraudulent check not legitimately conveyed to defendant. It appears that neither party discussed these facts at trial, and neither party discusses them on appeal, but the exhibits were submitted to the jurors as evidence for their consideration and we presume the jurors examined them during their deliberation.[5] We also presume the

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[5] The jury may examine and scrutinize physical evidence, and even conduct experiments "*within the lines of offered evidence* ….' (*Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651, 656-657 [(*Higgins*)], italics added.)" (*People v. Bogle* (1995) 41 Cal.App.4th 770, 778-779 (*Bogle*).) The jurors may use exhibits according to their nature to aid them in weighing the evidence that has been presented and in reaching a conclusion on a controverted matter. (See *Bogle*, *supra*, at pp. 778-780 [a set of keys and a safe were introduced into evidence; jury discovered that one of the keys on the key ring opened the safe]; *People v. Turner* (1971) 22 Cal.App.3d 174, 179 [jury used magnifying glasses to make more critical examination of exhibit than was made during trial]; *People v. Baldine* (2001) 94 Cal.App.4th 773, 778 [defendant testified that a scanner was not working because it needed batteries or a charge; jury turned on the scanner and found that it worked well].)

Bogle referred to an interesting example of the jury's independent discovery of facts within the scope and purview of the offered evidence in a case cited by the Supreme Court in *Higgins.* It was a "Virginia case in which assassins killed a group of unsuspecting victims. Winchester rifle cartridge shells were recovered from the scene and presented to the jury. The prosecution also introduced a matching caliber Winchester

existence of *every fact* favorable to the judgment that the jurors could reasonably infer and deduce from the evidence. (See *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) Those facts include the following:

Exhibits 29 and 30 are the torn portions of either three or four blank checks, which appear to be credit card checks originally attached to each other on a sheet. These torn checks were among the documents volunteered by defendant to Dickson on November 29, 2007. Exhibit 30, the left portion of a detached check, is written on the account of Walter Ray, payable through CBSI. The bottom of the check bears a bank number and part of an account number. Exhibit 29 is the right portion of three checks in sequence, *still attached to each other.* They appear to match exhibit 30. The first check is torn at an acute angle and is only a fragment of the lower right corner. The only number remaining is a 3. The second and third checks are larger portions. They bear the full check numbers 5174 and 5175, suggesting that the first check (ending in 3) is number 5173. Exhibit 30, the detached check, might be the left portion of check number 5173, or

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rifle recovered from the defendant. During the presentation of evidence the rifle was exhibited but was not taken apart. In an effort to rebut the prosecution's evidence, the defense showed the marks of the firing pin on the cartridge shells was different from the marks on the shells recovered from the scene. During deliberations, however, the jury took the rifle apart and determined that someone had tampered with the plunger or firing pin. The Virginia appellate court upheld the conviction. The *Higgins* court approvingly commented: 'A more acute prosecuting attorney might have caused the examination to have been made in open court and thus have demonstrated the trick and fraud, but his failure to do so afforded no ground for overthrowing the verdict of an intelligent and scrutinizing jury which, making its own examination of the evidence admitted to prove or disprove the very fact, discovered that the plunger "had been recently tampered with and fixed for the occasion of the trial."' (*Higgins, supra,* 159 Cal. at pp. 657-658, discussing and quoting *Taylor v. Commonwealth* (1893) 90 Va. 109, 17 S.E. 812.)" (*People v. Bogle, supra,* 41 Cal.App.4th at pp. 779-780.)

In the present case, the prosecution's failure to elicit testimony regarding the details of the checks did not prevent the jury from looking at them more carefully.

it might be another check altogether. The incomplete account numbers on exhibits 29 and 30 overlap, allowing the complete account number to be reconstituted.

Exhibit 11, found inside the envelope, is an intact check that appears to match the Walter Ray checks in exhibits 29 and 30. Exhibit 11 is printed on the same paper and it bears check number 5176, suggesting it is the next check in the sequence of credit card checks. This check, however, has been completed: it is dated October 27, 2007, and written to Breana Potter for $2,300. The check is written in a distinctive handwriting and style, with the distinctive language "and zero cents $\overline{^{\circ}{}^{\circ}}$" written on the amount line of the check. The back is endorsed in the name of Breana Potter, for deposit only. On closer inspection, however, it becomes obvious the check is *not* part of the original sequence of checks in exhibits 29 and 30. The account holder, Walter Ray, has *gained a middle initial* to become Walter B. Ray and the account number has *changed* (eight of the 14 numbers are altered), although the bank number remains the same and the check number remains in sequence. The name of Breana Potter, the beneficiary of the check, is found on two other documents in the envelope, as we discuss below. This evidence supports the inference that exhibit 11 is a *fraudulent* check, created from information on the torn portions of the blank Walter Ray checks in exhibits 29 and 30.

Exhibit 4, the $2,000 check to defendant, is dated October 3, 2007, and written on the account of Dave Stevens to "Stacy Otts" (misspelled). This check is written in the same distinctive handwriting and style, and with the same distinctive language "and zero cents $\overline{^{\circ}{}^{\circ}}$" as exhibit 11. The check is endorsed on the back in the name of Stacey Otts (spelled correctly) and the signature appears to match defendant's DMV signature (exhibit 32). From the notable similarities between exhibits 4 and 11, the jurors could deduce that exhibit 4 was written by the same person who wrote exhibit 11, a fraudulent check. Furthermore, if exhibits 11 and 4 were written by the same person on different accounts and in different account holders' names, the jurors could infer that exhibit 4 is also a *fraudulent* check. And the fact that this fraudulent check benefits defendant

supports the inference that she not only knew about the envelope's contents, but also participated in the fraudulent activity.

The remaining contents of the envelope further establish the fraudulent activities engaged in by defendant. As noted, the name of Breana Potter, the beneficiary of the fraudulent check in exhibit 11, appears again twice in the envelope's contents. Exhibit 13 is an October 23, 2007 check written on the account of Breana Potter to Albertsons (in writing that appears different from exhibits 11 & 4). The amount lines are both blank, but the check is signed in the name of Breana Potter. This signature, however, looks entirely different from the signature of Breana Potter used to endorse the back of the fraudulent check in exhibit 11. Breana Potter's name appears again as the account holder of a blank check drawn on an account at a different bank (exhibit 12). In addition, the envelope contains blank checks in another person's name, completed checks in other people's names, a Social Security card in someone else's name, and abundant notes of other people's personal identification information, all of which could be used for fraud and identity theft, as Dickson testified.

In sum, we conclude substantial evidence—including evidence of other crimes, which we will address further—supports the inference that defendant had the intent to complete the blank Moore checks to defraud. The envelope contained fraudulent and stolen checks, including defendant's own check, and personal identity information that could be used for fraudulent purposes. The envelope was in defendant's personal space and she had a relationship with a known perpetrator of fraud. All the inferences reasonably and logically drawn from the evidence support the findings that exhibit 4 is a fraudulent $2,000 check written to defendant; that she endorsed it; that she knew it was in the envelope in her bedroom; that she knew the envelope contained fraudulent items and fraud-related information; that she was a participant in, and a beneficiary of, the fraudulent activities; and that she intended to use the three blank Moore checks to defraud. Substantial evidence supports the conviction.

II. Other Crimes Evidence

Defendant asserts that the trial court erred by admitting evidence of other crimes committed by unknown persons, specifically (1) the contents of the envelope (other than the three Moore checks), (2) the checks defendant voluntarily gave the police on November 29, 2007, (3) testimony that two stolen Moore checks had been cashed, and (4) testimony that there was an investigation involving a fraudulently opened account in the name of Coleen Kapral. Defendant maintains there is no evidence linking these other crimes to her and thus they are irrelevant to show her intent to use the blank Moore checks to defraud. We disagree.

Although Evidence Code section 1101 prohibits the admission of evidence of other crimes to prove propensity or bad character, subdivision (b) of section 1101 allows this evidence when relevant to prove some fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. When a defendant's criminal intent is disputed, a sufficiently similar prior act is admissible to show that the defendant acted with the requisite intent. "The least degree of similarity between the crimes is needed to prove intent. [Citation.] [T]he doctrine of chances teaches that the more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous." (*People v. Steele* (2002) 27 Cal.4th 1230, 1244.) "Seldom will evidence of a defendant's prior criminal conduct be ruled inadmissible when it is the primary basis for establishing a crucial element of the charged offense." (*People v. Garrett* (1994) 30 Cal.App.4th 962, 967.) We review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149.)

A. Contents of the Envelope

Defendant argues that evidence of the contents of the envelope, other than the Moore checks, was improperly used as circumstantial evidence of a common scheme to support an inference of defendant's intent to defraud. She maintains there is no evidence

the other checks in the envelope are forged or stolen. She claims that because the prosecutor failed to link the contents of the envelope to her wrongdoing, the contents are at most evidence of someone else's wrongdoing, and thus the evidence is not probative of her participation in a common scheme.

As we have explained, the evidence does support the inference that some of the checks in the envelope are forged or stolen, and that the handwritten notes containing personal identification information of various people are for fraudulent purposes. As for the link to defendant, we have already concluded that defendant's possession of the envelope, the presence of exhibit 4 inside the envelope, and defendant's relationship with a known perpetrator of fraud all link defendant to the contents of the envelope and fraudulent activities. Thus, the contents of the envelope support the conclusion that defendant was involved in a fraudulent scheme and therefore intended to use the blank Moore checks for fraudulent purposes.

B. Checks Volunteered by Defendant on November 29, 2007

Defendant also asserts that there is no evidence that the checks she found in her trunk and voluntarily turned over to Dickson on November 29, 2007—exhibits 27, 28, 29 and 30—are stolen or forged, despite the prosecutor's implication. As we have explained, the record supports the inference that at least exhibits 29 and 30 are fraudulently obtained checks. Thus, evidence of these checks is relevant to show that defendant was involved in a fraudulent scheme and therefore intended to use the blank Moore checks to defraud.

C. Previously Cashed Moore Checks

Defendant contends Moore's testimony that two of her stolen checks had been cashed is not probative of defendant's intent to use the blank Moore checks to defraud because there is no evidence that defendant was the person who stole or cashed the Moore checks. She says that without evidence identifying her as the perpetrator of the

other crimes, the testimony only shows that other crimes had been committed by unidentified persons.

Jurors may consider other crimes evidence, when otherwise properly admissible, if the jurors are persuaded by a preponderance of the evidence that the defendant committed the other crimes. (*People v. Carpenter* (1997) 15 Cal.4th 312, 382, superceded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) To determine this aspect of admissibility, the trial court makes a preliminary determination of whether the proffered evidence is sufficient for the jury to find the other crimes true by a preponderance of the evidence. (*People v. Simon* (1986) 184 Cal.App.3d 125, 131-134.)

Other crimes evidence may be admissible even in circumstances where the defendant disputes the criminality or other factual predicate that makes the uncharged conduct relevant. For example, in *People v. Lisenba* (1939) 14 Cal.2d 403 (*Lisenba*), where the defendant was charged with the murder of his wife, evidence was admitted regarding the death of the defendant's former wife in Colorado under similar circumstances, even though the defendant had apparently never been convicted of the former wife's murder and he claimed her death was accidental. (*Id.* at pp. 424, 427-428.) The *Lisenba* court reasoned that the prosecution was not required to prove the asserted Colorado crime beyond a reasonable doubt because "'"[t]he facts regarding the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient.'"'" (*Id.* at p. 430; accord *People v. Medina* (1995) 11 Cal.4th 694, 763.) The

Lisenba court emphasized that other crimes evidence showing a common scheme or plan may be used if it "'merely *tends* to show an attempt to commit or the commission of other offenses ... even though it falls short of proving the *corpus delicti* of such other offenses.'" (*Lisenba, supra,* at p. 431.)

Similarly, in *People v. Simon, supra,* 184 Cal.App.3d 125, a case involving a defendant who was charged with jealously murdering the victim, evidence to refute self-defense was admitted showing the defendant's prior assault on another person, even though the defendant claimed the prior assault was not motivated by jealousy and thus it was irrelevant. (*Id.* at pp. 128-131.) The *Simon* court held that the other crimes evidence was admissible if the evidence was sufficient for the jury to find by a preponderance of the evidence that jealousy motivated the prior assault. (*Id.* at pp. 132, 134.)

We find unavailing defendant's citation to *People v. Albertson* (1944) 23 Cal.2d 550 to support her claim that the trial court erroneously admitted the other crimes evidence based on mere speculation that a third party committed them. The language on which defendant focuses, stating that "[c]ircumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences" (*id.* at p. 580), was to some extent derived from a rule that the other crimes must be proved by clear and convincing evidence, a standard that was expressly disapproved in *People v. Carpenter, supra,* 15 Cal.4th at pages 381-382. In any event, we do not conclude that a mere suspicion that the defendant (much less a third party) committed the other crimes is sufficient to admit the evidence. The standard is that the jury must be convinced that it is more probable than not that the defendant committed the other crimes before it may consider them. (*People v. Polk* (1965) 63 Cal.2d 443, 451.) Absent indications in the record to the contrary, we presume the trial court was aware of the applicable law requiring a showing that the other offenses could be found true by a preponderance of the evidence, and that it applied this standard in rendering its ruling. (Evid. Code, § 664; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032.)

Accordingly, it was not necessary for the prosecution to definitely prove defendant stole the Moore checks or cashed two of the stolen Moore checks, as long as there was sufficient evidence for the jury to find the existence of these facts by a preponderance of the evidence. We review the trial court's determination of the existence of this preliminary fact under the abuse of discretion standard. (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

Here, the evidence establishes that defendant possessed three of the stolen Moore checks; checks in various other people's names, some of which were also likely stolen, such as the Walter Ray checks defendant had in her bedroom dresser; a Social Security card; and an abundance of other people's personal identification information. Because these are items a person does not ordinarily possess unless she is involved in fraudulent activities, and because a person's possession of stolen items suggests she might have stolen the items, the jury could reasonably infer that defendant's possession of these items showed by a preponderance of the evidence that defendant stole the Moore checks and cashed two of them. This evidence is relevant to, and highly probative of, defendant's intent to complete and cash the blank Moore checks for fraudulent purposes. The trial court did not abuse its discretion when it determined there was sufficient evidence for the jury to find by a preponderance of the evidence the existence of the preliminary facts that defendant stole and cashed the Moore checks. (*People v. Lucas, supra,*12 Cal.4th at p. 466.)

D. Kapral Investigation

Over a hearsay objection, Dickson testified that he was familiar with Kapral's name because one of his active cases involved a fraudulently opened Washington Mutual checking account in her name. Defendant argues that the prosecutor insinuated defendant was connected to this other crime based on her possession of several blank Washington Mutual checks drawn on an account in Kapral's name. Defendant contends the Kapral account was never established to be fraudulent because Dickson's testimony was not

received for the truth of the matter, nor was the alleged fraudulent account linked to defendant's wrongdoing. Defendant asserts that, at the most, Dickson's statement is evidence that "another crime *may* have been committed by an unknown person."

Dickson's testimony was admitted to show that he was investigating a fraudulently opened Washington Mutual checking account in Kapral's name. This is evidence of another crime that is relevant only if the jury concluded defendant fraudulently opened the Kapral account, in which case, the evidence is relevant to, and probative of, defendant's fraudulent activities and her intent to defraud.

As with the stolen and cashed Moore checks, the prosecutor was not required to prove definitely that defendant fraudulently opened the Kapral account, provided there was sufficient evidence for the jury to find the existence of this fact by a preponderance of the evidence. Here, the jury could reasonably infer that defendant's possession of six blank checks drawn on a Washington Mutual account in Kapral's name, plus defendant's possession of various other fraud-related items, showed by a preponderance of the evidence that defendant fraudulently opened the Washington Mutual account in Kapral's name. The trial court did not abuse its discretion when it determined there was sufficient evidence for the jury to find the existence of this fact by a preponderance of the evidence. (*People v. Lucas, supra,* 12 Cal.4th at p. 466.)

E. Undue Prejudice

Defendant argues the other crimes evidence, if admissible, should nevertheless have been excluded because it was unduly prejudicial, particularly in light of the prosecutor's extensive reliance on this evidence when he argued intent and knowledge.

Evidence admissible under Evidence Code section 1101, subdivision (b) may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The trial court has broad discretion under this section and we will not disturb its

ruling unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, disapproved on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

The type of prejudice that Evidence Code section 352 was meant to avoid is not prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "'[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial."'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, evidence should be excluded as unduly prejudicial when it uniquely tends to evoke an emotional bias against the defendant as an individual and has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Branch* (2001) 91 Cal.App.4th 274, 286.) "'"[T]he statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors."' [Citation.] Painting a person faithfully is not, of itself, unfair." (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.)

Here, the evidence shows that defendant was involved in other similar fraudulent activities and therefore the evidence raises the inference that she harbored a criminal intent regarding the Moore checks. This is simply the damage that naturally flowed from relevant, highly probative evidence. Admission of the evidence was not an abuse of discretion.

F. Ineffective Assistance of Counsel

Defendant's alternative contention that defense counsel was ineffective for failing to object to the other crimes evidence also fails. To establish ineffective assistance of counsel, a defendant must show (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and (2) counsel's deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668,

687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) To establish prejudice, the accused must make a showing "sufficient to undermine confidence in the outcome" that but for counsel's deficient performance there was a "reasonable probability" that "the result of the proceeding would have been different." (*Strickland v. Washington, supra,* at pp. 693-694; *People v. Ledesma, supra,* at pp. 217-218.) We can adjudicate an ineffective assistance claim solely on the issue of prejudice without determining the reasonableness of counsel's performance. (*Strickland v. Washington, supra,* at p. 697; *People v. Ledesma, supra,* at pp. 216-217; *People v. Hester* (2000) 22 Cal.4th 290, 296-297.) Because we conclude the other crimes evidence was properly admitted, we see no prejudice in defense counsel's failure to object to it. Furthermore, we note that the failure to object may have been a strategic choice because defense counsel relied on certain other crimes evidence to implicate Doyle. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 582.)

III. Instruction on Limited Use of Other Crimes Evidence

Defendant contends the trial court erred in failing to instruct the jury sua sponte with CALJIC No. 2.50 as to the limited admissibility of the other crimes evidence, and with CALJIC No. 2.50.1 regarding the burden of proof applicable to the jury's consideration of that evidence.[6] She argues again that the other crimes are not connected

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[6] CALJIC No. 2.50 provides:

"[Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] [she] is on trial[.] [;] [and [in addition] evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crime[s] for which defendant[s] [is] [are] on trial.]

"[Except as you will otherwise be instructed,] [This] [this] evidence, if believed, [may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. It] may be considered by you [only] for the limited purpose of determining if it tends to show:

"[A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show [the existence of the intent which is a necessary element of the crime charged] [or] [the identity of the person who committed the crime, if any, of which the defendant is accused] [or] [a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offense[s] defendant also committed the crime[s] charged in this case];]

"[The existence of the intent which is a necessary element of the crime charged;]

"[The identity of the person who committed the crime, if any, of which the defendant is accused;]

"[A motive for the commission of the crime charged;]

"[The defendant had knowledge of the nature of things found in [his] [her] possession;]

"[The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;]

"[The defendant did not reasonably and in good faith believe that the person with whom [he] [she] engaged or attempted to engage in a sexual act consented to such conduct;]

"[The crime charged is a part of a larger continuing plan, scheme or conspiracy;]

"[The existence of a conspiracy].

"[That the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members].

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"[You are not permitted to consider such evidence for any other purpose.]"

CALJIC No. 2.50.1 provides:

"Within the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed [a] [crime[s]] [or] [sexual offense[s]] other than [that] [those] for which [he] [she] is on trial.

"You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that [a] [the] defendant committed the other [crime[s]] [or] [sexual offense[s]].

to her and thus the evidence shows only that some unknown persons had committed the crimes. In the alternative, she contends defense counsel was ineffective for failing to request these instructions.

Defendant recognizes that a trial court generally has no sua sponte duty to give a limiting instruction on uncharged criminal conduct. (*People v. Collie* (1981) 30 Cal.3d 43, 63 (*Collie*).) Although it is not entirely clear, it appears that this rule declining to impose a sua sponte duty to instruct on the limited admissibility of other crimes evidence extends equally to the accompanying instruction on the proof by a preponderance of the evidence standard applicable to other crimes evidence (CALJIC No. 2.50.1). (See *People v. Simon, supra,* 184 Cal.App.3d at pp. 131, 134, cited in use note to CALJIC No. 2.50.1 [preponderance of evidence instruction should be given upon request]; but see *People v. Simon* (1995) 9 Cal.4th 493, 501 and *People v. Mower* (2002) 28 Cal.4th 457, 483-484 [court must sua sponte instruct jury on burden of proof for each issue].)

Defendant, however, asserts that her case was an exceptional case requiring sua sponte instruction. As stated in *Collie,* "[t]here may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence." (*Collie, supra,* 30 Cal.3d at p. 64, italics omitted.)

This is not the extraordinary case defendant suggests. The uncharged crimes are by no means minimally relevant. For example, evidence that defendant's $2,000 endorsed check (exhibit 4) is not a legitimate check stolen by Doyle, as defendant argued,

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"[If you find other crime[s] were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged [or any included crime] in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.]"

but instead a fraudulent check intended to benefit defendant, supports the finding that defendant was a participant in the fraudulent activities and therefore had the intent to defraud. Furthermore, as we have stated, the crimes are connected to her through the presence of the incriminating envelope in her bedroom, the presence of her endorsed check inside the envelope, and her intimate relationship with a perpetrator of fraud. The evidence supports the inference that defendant participated in the other crimes.

Nevertheless, we conclude any error was harmless because it is not reasonably probable that the jury would have reached a result more favorable to defendant had CALJIC Nos. 2.50 and 2.50.1 been given. (See *People v. Carpenter, supra,* 15 Cal.4th at p. 393 [instructional error on how jury should consider evidence evaluated under standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]; *People v. Padilla* (1995) 11 Cal.4th 891, 950-951, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Falsetta* (1999) 21 Cal.4th 903, 923-925.) Considering the instructions as a whole (*People v. Castillo* (1997)16 Cal.4th 1009, 1016), we note that the jury was instructed that before it could draw an inference supporting guilt, the facts supporting the inference must be proved beyond a reasonable doubt: "[E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." (CALJIC No. 2.01.) Because the jury received this instruction and did not receive the instruction on preponderance of the evidence, the jury would not have applied a lesser standard than preponderance of the evidence to evaluate the other crimes evidence. In other words, the omission of the preponderance of the evidence instruction benefitted defendant as to the required level of proof. The jurors would have understood, for example, that they could not draw an inference of intent to defraud from defendant's theft of the Moore checks unless the prosecution first proved defendant had stolen the

Moore checks. We are satisfied any error in the omission of CALJIC Nos. 2.50 and 2.50.1 did not affect the verdict.

Having found no prejudice, we can conclude that defense counsel's failure to request the instructions resulted in no prejudice to defendant and therefore the ineffective assistance of counsel claim has no merit. (*Strickland v. Washington, supra,* 466 U.S. at p. 697; *People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.) In addition, we can conceive of a tactical reason for defense counsel's failure because the defense theory was based on Doyle's criminality and his connection to the envelope's contents. (See *People v. Fosselman, supra,* 33 Cal.3d at p. 582.)

IV. Instruction on Possession of Stolen Property

Defendant contends and the People concede that the trial court erred by instructing with the theft-related instruction, CALJIC No. 2.15, which provided:

> "If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant … is guilty of the crime charged. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.
>
> "As corroboration, you may consider the attributes of possession—time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, her false or contradictory statements, if any, and or other statements she may have made with reference to the property[,] a false account of how she acquired possession of the stolen property or any other evidence which tends to connect the defendant with the crime charged."

As both parties agree, CALJIC No. 2.15 is applicable only to theft-related offenses. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1176.) But we concur with the People that the error was harmless because defendant has not shown that it is reasonably probable a result more favorable to her would have been reached had the erroneous instruction not been given. (*Watson, supra,* 46 Cal.2d at p. 836; *People v. Prieto, supra,*

30 Cal.4th at p. 249 [*Watson* standard applies].) The presence of defendant's fraudulent $2,000 endorsed check (exhibit 4) inside the envelope containing a multitude of fraudulent and fraud-related items supports the inference that defendant's possession of the materials was for fraudulent purposes and that defendant therefore intended to use the Moore checks to defraud. Despite defendant's attempts to separate herself from the fraud-related items, the connection is firm and the evidence amply supports the jury's findings of possession and intent. CALJIC No. 2.15 did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt. The jurors were informed by other instructions that possession and intent were elements of the crime that had to be proved beyond a reasonable doubt (see CALJIC Nos. 2.01, 2.90, 15.07). In light of all the instructions and the strong evidence of guilt, the error was harmless.

V. Prosecutorial Misconduct

Defendant contends the prosecutor committed various types of misconduct that together denied defendant due process. She claims defense counsel was ineffective for failing to object to the misconduct.

During argument, a prosecutor "is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such '"unfairness as to make the resulting conviction a denial of due process."' (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Under *state* law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Cook* (2006) 39 Cal.4th 566, 606, italics added.)

If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the comments would, or could, have been understood by a reasonable juror in the context of the entire argument, and whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) No misconduct exists if a juror would have taken the remarks to state or imply nothing harmful. (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

To preserve a claim of prosecutorial misconduct for appellate review, a defendant must raise a timely and specific objection and, where practical, request a curative admonition. (Evid. Code, § 353; *People v. Thornton* (2007) 41 Cal.4th 391, 454.) Absent such an objection and request for admonition, any error is forfeited. (*People v. Thornton, supra*, at p. 454.)

Prosecutorial misconduct requires reversal only if it prejudices the defendant. (*People v. Fields* (1983) 35 Cal.3d 329, 363.) Where it infringes upon the defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *Chapman v. California* (1967) 386 U.S. 18, 24.) Prosecutorial misconduct that violates only state law is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the untoward comment. (*People v. Bolton, supra,* at p. 214; *Watson, supra,* 46 Cal.2d at p. 836.) We presume the jury relied on the trial court's instruction on the law rather than on the prosecutor's comments. (*People v. Morales, supra,* 25 Cal.4th at p. 47.)

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel's incompetence;

generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)" (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) "Finally, of course, even where the prosecutor's statements amount to misconduct, defense counsel may have sound tactical reasons for not objecting. 'The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.' [Citation.]" (*People v. Padilla, supra,* 11 Cal.4th at p. 940.)

A. Guilt-by-Association Argument

Defendant's first claim of prosecutorial misconduct is that the prosecutor improperly argued that defendant was guilty by reason of her association with Doyle. Defendant points to the prosecutor's repeated reference to defendant's "hand-in-glove" relationship with Doyle. She asserts that this argument was the only means from which the jury could impute criminal conduct to her.

Personal guilt, not guilt by association, is required by due process. (See *People v. Chambers* (1964) 231 Cal.App.2d 23, 28-29.) And to argue guilt by association constitutes prosecutorial misconduct. (*People v. Lopez, supra,* 42 Cal.4th at p. 967; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072; *People v. Galloway* (1979) 100 Cal.App.3d 551, 563; *People v. Chambers, supra,* at p. 28.)

In his opening argument, the prosecutor explained that defendant had knowledge of the contents of the envelope because of her hand-in-glove relationship with Doyle, her endorsed $2,000 check (exhibit 4) inside the envelope, and the necessity of having a woman to draw on the accounts held by women. The prosecutor then stated:

> "It's a hand-in-glove relationship. She knows this Damien Doyle. She trusts this Damien Doyle, as hard as it is for us to believe. And she's aware of what he's got as far as these documents and where he's put them. [¶] The defense is going to talk to you about reasonable doubt. A reasonable explanation is not that she's an ostrich with her head in the

ground. The reasonable explanation is that she's aware of everything that's going on."

When the prosecutor discussed the possession element further, he explained:

"Here they are, folks, sitting on the defendant's bedstand, left there for her to be taken at her word by this Damien Doyle character. And there are documents in there that apparently belong to Damien Doyle, but she's aware of it. She has knowledge of her possession. She knows that—where that envelope is. She knows what's in it. That's the only reasonable explanation, folks, and that gets us past the first element."

The prosecutor further argued that defendant was a principal in the crime, actively participating with her eyes open. She knew of Doyle's criminal purpose and she aided and abetted his crimes.

In response, defense counsel argued that the prosecutor's hand-in-glove theory was a theory without proof. Defense counsel's argument proceeded as follows: Defendant was charged with one crime and the rest was "just kind of backfill." There was reasonable doubt as to both possession and intent because of Doyle—a real person who was a mail thief and a fraudulent check printer involved in identity theft. He left things, including the envelope, in defendant's apartment. He was linked to the contents of the envelope. The envelope contained a personal letter to him, which was the sort of letter someone would keep with his personal effects. The envelope also contained the personal information of Pamela Rosetto, and Doyle was earlier found in possession of a check written to Pamela Rosetta (spelled this way). The envelope itself was a regular envelope folded in half, suggesting it was personal property that someone would carry in a pocket rather than share with someone else. As for how the envelope ended up in defendant's bedroom, defense counsel said it was not hard to figure out, without "draw[ing] the whole picture" for the jury, how Doyle's items could have ended up on the headboard in a single woman's bedroom at 2:44 a.m.; it could be surmised that Doyle had been in defendant's bedroom and had put his items on the headboard shelf. As for defendant's $2,000 endorsed check inside the envelope, Doyle may have stolen

defendant's check after she endorsed it or he may have stolen it and forged her name. The check proved nothing other than that Doyle knew defendant and her name was on the check. The contents of the envelope belonged to Doyle only.

Referring again to the prosecutor's relationship theory, defense counsel argued it was possible, but not probable, that defendant was in love with Doyle. Even if the jury had a suspicion, proof beyond reasonable doubt was required. Defendant had nothing to do with the crime. She was "set up" and "left holding the bag" by Doyle.

The prosecutor responded that Doyle was an appealing scapegoat, but pointed out that two people can possess the same property. The prosecutor said that a person would know the location of his or her $2,000 check. The prosecutor agreed with defense counsel's portrayal of the letter to Doyle as a personal item to be kept in a place of trust—in the possession of someone with whom Doyle was having a hand-in-glove relationship and who was helping him commit fraud. Doyle trusted defendant with the envelope. Because of their relationship, defendant knew about the envelope, its contents and the fraud.

We conclude the prosecutor was not attempting to establish defendant's guilt based only on her association with Doyle. Other evidence supports the finding that defendant was aware of the fraudulent activities, participated in them, and benefitted from them. Her relationship with Doyle is only one fact supporting her guilt. Furthermore, that relationship pertained to the prosecution's aiding and abetting theory and the prosecutor was justified in arguing it. The jury would have understood its relevance in light of the evidence presented and the prosecutor's argument as a whole. It is not reasonably likely that the prosecutor's remarks were understood by the jurors as arguing defendant's guilt by association. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 960.)

B. Reference to Facts Not in Evidence

1. Cashed Moore Checks

Defendant says the prosecutor improperly argued that defendant had the intent to defraud because two of the stolen Moore checks had been cashed. By doing so, according to defendant, the prosecutor insinuated the following facts that were not in evidence: (1) that defendant was aware the two Moore checks were cashed, (2) that defendant participated or benefitted from the cashing of the two Moore checks, and (3) that her current possession of three blank Moore checks directly tied her to the cashing of the other two Moore checks. Defendant maintains that the prosecutor's argument made no sense unless these three facts were assumed true, and therefore the argument was highly prejudicial misconduct.

The prosecutor's mention of the cashed Moore checks was a reference to evidence of another crime. As we have explained, the record contains sufficient evidence from which the jurors could find by a preponderance of the evidence that defendant did cash the two Moore checks. The prosecutor's insinuations were simply logical deductions the jurors were permitted to make based on the evidence.

2. Kapral Investigation

Defendant contends the prosecutor urged the jurors to use evidence of the Kapral investigation for a purpose other than that for which it was admitted. The prosecutor argued that the checks with Kapral's name on them supported defendant's knowledge and intent. He then stated, "You heard the officer testify that he was investigating these possibly fraudulent checks." Defendant believes this argument required the jurors to assume other facts not in evidence, such as that the Kapral checks in the envelope involved the same Kapral and that they were drawn on the fraudulently opened Kapral account. As we have explained, these are inferences the jurors could properly draw from the evidence and thus the prosecutor did not commit misconduct by referring to the fraudulently opened account as evidence supporting defendant's knowledge and intent.

3. Defrauded People

Defendant claims the prosecutor's argument regarding the people whose personal identification information was contained in the envelope was pure speculation unsupported by any reasonable inferences. The prosecutor argued: "These people may have been defrauded out of their entire future"; "[Defendant] knows full well that these documents are used to defraud, to take money from someone else"; and "The only reasonable interpretation in this case is that the defendant was in possession of that envelope, knew of its contents, and was participating in the use of those contents to defraud." Defendant explains that these arguments assumed the following facts not in evidence: (1) that the names on the documents refer to existing people, (2) that the documents are fraud-related, (3) that defendant knew of the envelope's presence and contents before the police discovered the envelope, (4) that defendant understood the fraudulent purpose from the face of the documents, and (5) that she agreed to participate or assist in the fraudulent activities. Again, what defendant portrays as facts not in evidence are reasonable inferences the jurors could make from the evidence before them. The prosecutor was not relying on evidence outside the record, nor was he urging the jurors to rely on suspicions or resort to speculation.

C. Misstatement of the Law

Defendant asserts that the prosecutor misstated the law when he encouraged the jurors to presume defendant had the intent to complete the blank Moore checks based simply on her possession of those checks. The prosecutor stated:

> "The second element, that the person had specific intent to complete or facilitate the completion of that item. What—this [is] lawyer speak if I ever heard of it. To complete or facilitate the completion? What do we mean by that? Well, in this case what we mean is to get money out of this account[;] use the information on these blank checks to get money. *That's the only reason anybody would have these checks*, including the legitimate owners, is to use them to get money or to pay out money. Element two is met beyond a reasonable doubt." (Italics added.)

Defendant is correct that possession of blank checks alone is not enough to prove intent to complete those checks to defraud (*People v. Norwood, supra,* 26 Cal.App.3d at p. 159), but defendant's claim here is targeted only at the element of intent *to complete* the blank checks—in other words, to fill them out. As the prosecutor's comments reflect, it is hard to conceive of anyone completing a check without intending to complete the check. This is the ordinary and intended use of checks. We recognize that CALJIC No. 15.07 separates intent into two elements—(1) the intent to *complete* (or facilitate the completion of) the blank check and (2) the intent to *defraud* another person. This is surely the reason the prosecutor attempted to address both elements separately. We think, however, that separating intent into two elements here is potentially confusing and not a true reflection of the statutory language, which requires "the intention of completing the [check] or the intention of facilitating the completion of the [check], *in order to defraud* any person …." (§ 475, subd. (b), italics added.) What is required is that the defendant intended to defraud *by completing the check.* Completing the check was the method by which the defendant intended to defraud. In our opinion, CALJIC No. 15.07 could be improved upon and indeed it has been by CALCRIM No. 1931, which instructs on intent as a single element—the intent to complete (or aid the completion of) the blank check "in order to defraud."

In light of the prosecutor's entire argument, we do not believe there is any chance the jurors took the comments to mean possession of the blank Moore checks was enough to show the intent to complete the checks in order to defraud.

D. Appeal to Sympathy for Moores

As a last claim of misconduct, defendant argues that the prosecutor improperly appealed to the jurors' sympathy for the victims by urging the jurors to protect the Moores. In our view, this was not misconduct. Evidence supports the inference that defendant was the person who cashed two of the stolen Moore checks and therefore that she possessed the many remaining stolen Moore checks. In any event, the jurors were

instructed that they "must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," and that, if the attorneys said anything during trial that conflicted with the court's instructions, the jurors must follow the instructions. (CALJIC No. 1.00.) We presume they did so, and defendant was not prejudiced by the prosecutor's comment. (*People v. Cain* (1995) 10 Cal.4th 1, 52.)

E. Cumulative Misconduct and Ineffective Assistance of Counsel

Having concluded that the prosecutor committed no misconduct, or that any impropriety was harmless, we also conclude there was no cumulative effect from any misconduct. Accordingly, there was no reason for a defense objection to misconduct, and the failure to object did not result in a violation of defendant's constitutional right to the effective assistance of counsel. (*People v. Lopez, supra,* 42 Cal.4th at p. 966.)

VI. Cumulative Error

Defendant also urges us to apply the cumulative error doctrine on the ground that the alleged trial errors had the cumulative effect of denying her the right to a fair trial. Based on our review of the record, we conclude there was no error warranting reversal, whether considered separately or cumulatively. (*People v. Roybal* (1998) 19 Cal.4th 481, 531.) The premise behind the cumulative error doctrine is that, while a number of errors may be harmless taken individually, their cumulative effect requires reversal. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 ["'[a] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error'"].) Even when evaluated collectively, any errors that occurred in this case were harmless. Defendant was entitled to a fair trial, not a perfect one. (*People v. Cunningham, supra,* at p. 1009.)

DISPOSITION

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Hill, J.